SUPREME COURT, U. S.

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1964

No. 885

CORO, INC.,

Petitioner,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner Coro, Inc. respectively prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the First Circuit entered in the above entitled proceeding on November 10, 1964.

Opinion Below

The opinion of the United States Court of Appeals for the First Circuit is reported at 338 F.2d 149 and is reprinted in Appendix A, infra, p. 1 a.

Jurisdiction

The decree of the United States Court of Appeals for the First Circuit was entered on November 10, 1964. Petitioner's petition for rehearing or to correct the record was denied on December 3, 1964. The jurisdiction of this

Court is invoked under 28 U.S.C. Section 1254(1) and 15 U.S.C. Section 45 (c).

Question Presented

Is the scope of the order herein justified by the findings of fact of the Court of Appeals affirmatively indicating that the order covers practices which have neither been pursued nor are persuasively related to the proven conduct of the petitioner?

Statute Involved

The pertinent provisions of the Federal Trade Commission Act, 38 Stat. 719, as amended, 43 Stat. 939, 52 Stat. 111 and 1028, 62 Stat. 991, 63 Stat. 107, 64 Stat. 21, 66 Stat. 632, 72 Stat. 809 and 942, and 74 Stat. 200; 15 U.S.C. Sec. 45 are set forth in Appendix B infra p. 1b.

Statement

This case involves a petition for review of a Federal Trade Commission order.

The sole issue upon which review is sought is the scope of the order entered by the Federal Trade Commission, which order applies to activities not remotely connected with, let alone persuasively related to, the activities complained of.

The petitioner, Coro, Inc. (hereinafter referred to as "Coro") is, in the words of the Hearing Examiner, "a large, responsible, publicly held corporation." Coro is and has been engaged in the manufacture, sale and distribution in commerce of costume jewelry, watches and other products.

In addition to its normal business of selling to department stores, variety stores and other retailers, Coro, for a time prior to the issuance of the complaint, also sold to so-called Catalog Houses. Catalog Houses sell to retailers located primarily in small towns; to industrial and commercial firms for their own purposes; to organizations, such as fraternal groups; and on occasion, to individual customers (either through a catalog—or in a showroom maintained by a Catalog House). Coro's sales to the catalog house industry were commenced in 1955 or 1956. These sales, in the words of the Hearing Examiner, constituted "only * * * a small segment of its business."

This can be seen by comparing the gross sales of Coro for the three years at issue in this proceeding—1958, 1959 and 1960—with its sales during those years to Catalog Houses.

Year	Gross Sales of Coro, Inc.	Catalog House Sales of Coro, Inc.
1958	$29,205,185	$227,925
1959	30,910,688	186,209
1960	33,191,895	172,078

As will be discussed in detail below, in December 1960, Coro completely abandoned all sales to Catalog Houses and has no intention whatsoever of resuming such sales.

The point is that the Commission's *entire* 'ficticious pricing' case relates *exclusively* to Coro's sales to the unique catalog house industry—which constituted less than 1% of its business, and which sales were abandoned before the complaint herein was filed. *So far as this record is concerned the pricing practices complained of did not exist in any other phase of Coro's business.*

In conjunction with sales to Catalog Houses, Coro prepared catalog insert sheets for binding in the catalog

of the particular Catalog House involved, or in some instances, color positives, to be used by the catalog houses which printed their entire catalog themselves. The fictitious pricing charge concerns the pricing information contained on said catalog insert sheets or color positives.

To solicit orders from Catalog Houses, Coro submitted a sample mock-up of its proposed catalog pages for the year in question, together with a coding sheet, to each Catalog House with which it offered to do business. Each coding sheet contained a blank line for each item contained on Coro's catalog pages. These blank lines were to be filled in by Coro's Catalog House customers with the so-called price line, that is, the Catalog House's code number for the particular item and a list price for that item.

The so-called price line was not dictated by Coro. In all cases, Coro printed as the price line whatever its Catalog House customer wanted printed.

In its 1958 and 1959 coding sheets, Coro did suggest certain list prices, but as indicated above, it was up to the particular Catalog House customer to designate what it wanted as the price line, irrespective of Coro's suggestions. For the year 1960, however, Coro, on advice of counsel, ceased entirely to suggest any list prices on its coding sheets and in December 1960, all sales to the industry were discontinued.

The Initial Decision of the Hearing Examiner and the decision of the Federal Trade Commission held that the list prices placed by Coro on the appropriate catalog insert sheets or color positive, and ultimately supplied to the consumer by Coro's Catalog House customers, were ficticious prices and not the usual and regular prices for the items in question. In particular, the Commission held that the serial number for the items in question included

a coded designation of the actual price charged by the Catalog Houses, which price was lower than the retail price set forth in the Catalog. These findings were not contested by Coro in its appeal to the First Circuit.

Aside from catalog pages, there was absolutely no evidence of any sort introduced in this proceeding concerning Coro's selling or pricing activities with respect to all of its other sales constituting over 99 percent of Coro's business. Moreover, with respect to sales to Catalog Houses, the record is clear that Coro did not "pre-ticket" the merchandise sold to the Catalog Houses and displayed on the catalog pages.

It must be emphasized that the practices here involved were not originated by Coro. Instead, they were accepted and widespread throughout the Catalog House industry long before Coro commenced its sales to Catalog Houses. In engaging in these practices Coro was merely following the accepted usages of the industry. Moreover, after Coro abandoned its sales to Catalog Houses in 1960 the practices continued in the Catalog House industry but without Coro's participation. Hence, it can be readily discerned that the practices here involved were peculiarly the product of the Catalog House industry, an industry with which Coro no longer has any connection.

The complaint herein was issued by the Commission on April 15, 1961. Previously, in December 1960, albeit after the FTC initiated an investigation of these practices, Gerald E. Rosenberger, the Chairman of the Board and President of Coro, Jerome Roberts, a Vice President of Coro, Edwin Oppenheimer, the Coro employee in charge of Catalog House sales, and Coro's counsel, held a meeting at which it was resolved that Coro would cease entirely all sales to all Catalog Houses. This decision was then

embodied in a memorandum from Mr. Roberts to Mr. Oppenheimer and Mr. Morris Malkin, another employee who supervised Coro's Catalog House business. Thereafter, Coro advised all Catalog Houses with which it did business that it would no longer sell its merchandise to them. The Federal Trade Commission was advised of the abandonment of the practice well before it issued the complaint herein.

At the hearings both Mr. Rosenberger and Mr. Oppenheimer stated categorically that Coro did not intend to resume selling to Catalog Houses. The Commission did not try to introduce any evidence to the contrary and indeed there is nothing in the record which in any way even hints that Coro would ever resume such sales.

The Hearing Examiner concluded his discussion of the facts of the abandonment with the following statement:

> "Since the decision to abandon these sales, there has been no merchandise sold to any catalog customer, and it was stated that Coro has no intention of resuming the Catalog business in the future."

At the conclusion of the hearings herein the Hearing Examiner found that the practices herein described constituted "unfair and deceptive acts and practices and unfair methods of competition" in violation of the Federal Trade Commission Act.

Accordingly, the Hearing Examiner proposed an order prohibiting the acts specifically complained of. But further, despite the fact that Coro had abandoned sales to the entire industry prior to issuance of the complaint, despite the fact that the practices complained of pertained only to a unique "small segment of its business" (actually less than 1% of its business), and despite the

fact that it was not shown that Coro in any other way improperly labeled or advertised the retail price of any of its merchandise, the order went on to impose broad and restrictive restraints on Coro's entire business.

Coro appealed to the Commission that this order was far too broad and unrelated to any proven practices. However, the Commission not only rejected this contention but modified the order of the Hearing Examiner to make it even more unlimited in scope, restrictive in effect and uncertain as to meaning. Thus, paragraphs 1 through 4 of the Commission's order prohibit the following.

> "1. Representing directly or by implication, on catalog inserts sheets, on color positives for the printing of such catalog sheets, or on price lists, *or in any other manner,* that any amount is the usual and regular retail price of merchandise when such amount is in excess of the price at which such merchandise is usually and customarily sold at retail in the trade area or areas where the representations are made.
>
> 2. Supplying to, or placing in the hands of, any distributor, dealer or other purchaser, catalog sheets *or other materials* which are displayed to the purchasing public and which contain an indicated retail price for respondents' merchandise when the indicated retail price is in excess of the generally prevailing retail price for such merchandise in the trade area or when there is no generally prevailing retail price for such merchandise in the trade area.
>
> 3. *Furnishing to others any means or instrumentality by or through which the public may be misled as to the generally prevailing retail prices of respondents' merchandise.*

4. *Putting into operation any plan whereby retailers or others may misrepresent the usual and regular prices of such merchandise.*" (Emphasis supplied.)

The problem presented to Coro is this: while the record does not show what other practices might fall within the ambit of the order, this Court may take judicial notice of the fact that many costume jewelry manufacturers do pre-ticket merchandise. In other words, they place tickets on the jewelry stating the suggested retail price, which tickets remain on the jewelry when presented for sale to the consumer by the retailer (assuming the retailer wishes to sell at the pre-ticketed price). Moreover, such companies distribute display materials to retailers with suggested retail prices thereon. Such commercial activities as these, as well as others, would fall within the ambit of the order, even though not remotely connected with the instant case. Surely there is no hint in this case that Coro's preticketing activities are in any way questionable. And yet they fall within the order!

Coro filed a petition for review with the United States Court of Appeals for the First Circuit based in part on the scope of this order. As indicated above, Coro did not contend on appeal that the practices were legal. The Court of Appeals specifically found that

> "there is no showing of past violations by Coro, that the violation found was with respect to less than 1% of Coro's business, that its conduct was in accordance with long established practice of catalog houses and that it stopped doing business with catalog houses before the complaint issued."

Despite this the Court of Appeals sustained the broad order herein on the ground that the FTC had wide dis-

cretion in determining the scope of one of its orders. Apparently the Court of Appeals believed that this discretion is virtually unreviewable by a court even when a whole host of factors demonstrate that there is no need to extend the coverage of the order beyond the actual unlawful practices found by the commission. Moreover, this order was sustained despite the fact that under section 5(l) of the Federal Trade Commission Act, *infra*, p. 8b violations of the order are punishable by civil penalties of up to $5,000 per day.

Basis of Jurisdiction of the Federal Courts

The basis of jurisdiction of the United States Court of Appeals for the First Circuit is Section 5(c) of the Federal Trade Commission Act quoted in full text in Appendix B herein p. 3b.

Reasons for Granting the Writ

1. The decision of the Court of Appeals is in conflict with prior decisions of this Court.

The opinion of the First Circuit acknowledged:

a. that there was no showing of past violations by Coro;

b. that the violations found were with respect to less than 1% of Coro's business;

c. that Coro's conduct was in accordance with the long established practice of catalog houses; and

d. that Coro stopped doing business with catalog houses before the complaint issued.

All four of these specific findings of the court below justify a conclusion that Coro was unlikely to engage in any deceptive pricing practices other than the ones specifically found by the FTC. Yet, these findings were in the very next breath completely disregarded. The First Circuit indicated that regardless of any of the factors militating against the need for a broad order it would sustain practically any FTC order.

Such a disregard of the factual context in which the order is issued and the need or lack of need for any extension of the scope of the order beyond the actual practices involved is, we submit, contrary to the decisions of this Court.

This Court has taken pains to enunciate the doctrine that the scope of an administrative agency's order must be viewed in the light of the realities of the situation and especially whether the particular factual situation requires a broad order. This means that the order must be tailored to fit the violation found and the likelihood of future violations, and should not contain general language applied indiscriminately in all circumstances.

This doctrine was first enunciated by this Court in the landmark decision of *NLRB* v. *Express Publishing Co.*, 312 U. S. 426 (1941). This Court emphasized that an administrative agency and a reviewing court must consider whether the circumstances require a broad order precisely the way a court of equity considers the circumstances in framing an injunction decree. Thus, this Court stated at 436-37:

> "The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of

> their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past. See United States *v.* Trans-Missouri Freight Asso. 166 U. S. 290, 308, 309, 41 L. ed. 1007, 1016, 1017, 17 S. Ct. 540; Standard Oil Co. *v.* United States, 221 U. S. 1, 77, 55 L. ed. 619, 652, 31 S. Ct. 502, 34 LRA (NS) 834, Ann Cas 1912D 734; Texas & N.O.R. Co. *v.* Brotherhood of R. & S. S. Clerks, 281 U. S. 548, 74 L. ed. 1034, 50 S. Ct. 427; Local 167, I. B. T. *v.* United States, 291 U. S. 293, 78 L. ed. 804, 54 S. Ct. 396; Virginian R. Co. *v.* System Federation, R. E. D. 300 U. S. 515, 541, 543, 544, 81 L. ed. 789, 796, 797, 798, 57 S. Ct. 592. We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past. That justification is lacking here. To require it is more onerous or embarrassing to the Board than to a court."

Express Publishing was specifically followed by this Court in *May Department Stores* v. *NLRB,* 326 U. S. 376 (1945).

These cases were also followed by this Court in *Communications Workers* v. *NLRB,* 362 U. S. 497, 480-81 (1960):

> Petitioners were not found to have engaged in violations against the employees of any employer other than Ohio Consolidated and we find neither justification nor necessity for extending the coverage of the order generally by the inclusion therein

> of the phrase 'any other employer.' 'It would seem * * * clear that the authority conferred on the Board to restrain the practice which it has found * * * to have (been) committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.' NLRB *v.* Express Pub. Co., 312 U. S. 426, 433, 85 L. ed. 930, 936, 61 S. Ct. 693 (1941). See also May Dept. Stores Co. *v.* NLRB, 326 U. S. 376, 90 L. ed. 145, 66 S. Ct. 203 (1945)."

The philosophy behind these cases involving National Labor Relations Board orders was applied in a decision of this Court concerning the scope of a Federal Trade Commission order, *FTC* v. *Mandel Bros., Inc.,* 359 U. S. 385 (1959). Although that opinion sustained the Commission order in question, it did so based upon the particular factual situation presented in the record. Importantly, however, this Court emphasized the significance of the factual situation in determining the appropriate scope of an order. Thus, this Court stated at 392-93:

> "One cannot generalize as to the proper scope of these orders. It depends on the facts of each case and a judgment as to the extent to which a particular violator should be fenced in. Here, as in Sherman Act decrees (Local 167, I.B.T. *v.* United States, 291 U. S. 293, 299 78 L. ed. 804, 809, 54 S. Ct. 396; International Salt Co. *v.* United States, 332 U. S. 392, 400, 401, 92 L. ed. 20, 28, 68 S. Ct. 12; International Boxing Club *v.* United States, 358 U. S. 242, 253, 3 L. ed. 2d 270, 278, 79 S. Ct. 245), the question of the extent to which related activity should be enjoined is one of kind and degree. We sit only to determine if the trier of facts has exercised an allowable discretion. Where the episodes of misbranding have been so extensive and so sub-

> stantial in number as they were here, we think it permissible for the Commission to conclude that like and related acts of misbranding should also be enjoined as a prophylactic and preventive measure."

The procedure called for by the *Mandel Bros.* case was ignored by the court below. The First Circuit merely generalized that the FTC has wide discretion in framing an order and hence the Commission could ignore the facts of the case before it and the extent to which Coro should be "fenced in." The court never even considered whether there had been an abuse of the allowable discretion—the text propounded in the *Mandel Bros.* case. More importantly the court ignored its own finding that the activity was very narrow and surely abandoned, and hence, under *Mandel*, worthy only of a narrow order.

We submit, therefore, that this opinion is at variance with the long standing decisions of this Court.

The First Circuit cited several decisions of this Court in order to justify its decision on the scope of the order. These decisions are not only entirely inapplicable but in fact support petitioner's contentions herein. Indeed all these decisions were so cited in *Country Tweeds, Inc.* v. *FTC*, 326 F. 2d 144 (2nd Cir. 1964), which narrowed the scope of an FTC order.

Jacob Siegel Co. v. *FTC*, 327 U. S. 608 (1946), did not involve the question presented here: whether the order entered is reasonably related to the practices found to exist or likely to occur in the future. Instead, it concerned the measures necessary to dissipate the deceptive effect of the actual mislabeling found to have existed. The *Siegel* decision re-emphasized that a reviewing court should modify a Commission order if the FTC had abused its discretion. In the instant case the First Circuit has abdicated this responsibility and instead has given the Commission absolute discretion to frame any order that

has some "reasonable relation to the unlawful practices found to exist" irrespective of whether the facts warrant such an order.

FTC v. *Henry Broch & Co.*, 368 U. S. 360 (1962), did not involve a FTC order which would have been punishable in a contempt proceeding since it involved a Clayton Act order not yet covered by the Clayton Finality Act, see 368 U. S. at 365 n.5. This distinction was stressed by this Court in upholding the order before it in the *Broch* case. Indeed, this Court emphasized that the *Broch* case would not be precedent for upholding broad orders punishable by contempt proceedings. The opinion required a different standard, namely, that of *Express Publishing*, to be applied in the potential "contempt" cases. Thus, this Court stated at 367-68:

> "We do not wish to be understood, however, as holding that the generalized language of paragraph (2) would necessarily withstand scrutiny under the 1959 amendments.
>
> The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application. See NLRB *v.* Express Pub. Co. 312 U. S. 426, 435-437, 85 L. ed. 930, 937, 61 S. Ct. 693; Federal Trade Com. *v.* Cement Institute, 333 U. S. 683, 726, 92 L. ed. 1010, 1047, 68 S. Ct. 793; Federal Trade Com. *v.* Morton Salt Co. 334 U. S. 37, 54, 92 L. ed. 1196, 1208, 68 S. Ct. 822, 1 ALR2d 260. Compare New York, N. Y. & H. R. Co. *v.* Interstate Commerce Com. 200 U. S. 361, 404, 50 L. ed. 515, 526, 26 S. Ct. 272; Swift & Co. *v.* United States, 196 U. S. 375, 400, 401, 49 L. ed. 518, 526, 25 S. Ct. 276."

Since this case involves an order punishable by contempt proceedings, the *Broch* case is a precedent not for indiscriminately sustaining any order which the Commission may choose to enter, but rather for closely scrutinizing the order in the light of the factual need for such an order which may be manifested in the record. It is precisely for such a proposition that *Broch* has been cited in the Second Circuit in the cases discussed at length below which struck down broad orders.

The distinction made by the *Broch* case is one of long standing. The *Express Publishing* decision, supra, repeatedly stressed the fact that labor board orders are punishable by contempt proceedings. The opinion in *May Department Stores,* supra, explicitly recognized the difference, to any party to an administrative proceeding, between being required to obey some particular section of law by that provision of law itself which is applicable to everybody, and being obligated to obey that section by an order of an administrative agency punishable by contempt of court. Thus, this Court stated at 388:

> "The scope of injunctions which follow National Labor Relations Board determinations is important to employer and employee. While contempt proceedings can be instituted only by the Board and in the public interest, the possibility of contempt penalties by the court for future Labor Act violations adds sufficient additional sanctions to make material the difference between enjoined and non-enjoined employer activities."

Thus, this Court has repeatedly required a higher standard in judging the appropriate scope of an administrative agency order, when that order is punishable, as in the instant case, by contempt proceedings.

In *FTC* v. *National Lead Co.*, 352 U. S. 419 (1957), this Court stressed the factors in that case which indicated the need for a broadly worded order in order to prevent future violations. It is precisely the absence of any discussion of the factual reasons why such a broad order is needed here, in light of the facts in the record, that demonstrate that the First Circuit departed from the tests propounded by this Court. The absence of such a discussion is all the more flagrant in light of the court below's own findings which indicate that a broad order is unnecessary.

2. The decision of the First Circuit is in conflict with the decisions of the Second Circuit.

The decision of the First Circuit herein not only conflicts with the decisions of this Court but is also at variance with the decisions in the United States Court of Appeals for the Second Circuit. The Second Circuit has repeatedly made precisely the factual weighings of the need for broad orders that is so conspicuously absent in this case. Thus, in *Swanee Paper Corp.* v. *FTC*, 291 F. 2d 833, 837, 838 (2nd Cir. 1961), cert. denied, 368 U. S. 987 (1962), the Second Circuit struck down a broad FTC order as unsupported by the facts of that case:

> "Although the Commission's finding of a Section 2(d) violation is supported by the record, the breadth of the order issued is not justified by the facts. Administrative agencies have wide discretion in framing their orders and are empowered to enjoin other related unlawful acts which may occur in the future (e.g., F. T. C. *v.* Mandel Brothers, Inc., 1959, 359 U. S. 385, 79 S. Ct. 818, 3 L. ed. 2d 893),

but there must be some relation between the facts found and the breadth of the order. F.T.C. *v.* Mandel Brothers, Inc., supra; F. T. C. *v.* National Lead Co., 1957, 352 U. S. 419, 77 S. Ct. 502, 1 L. ed. 2d 438; N. L. R. B. *v.* Express Pub. Co., 1941, 312 U. S. 426, 61 S. Ct. 693, 85 L. ed. 930; N. L. R. B. *v.* Crompton-Highland Mills, Inc., 1949, 337 U. S. 217, 69 S. Ct. 960, 93 L. ed. 1320. Nothing in the record here indicates flagrant or extensive violations of Section 2(d) by Swanee; the single violation found occurred in an uncertain area of the law and was discontinued before the complaint was filed."

It will be noted that all the factors weighed by the Second Circuit in *Swanee* are present here:

a. Nothing indicates flagrant or extensive violations;

b. The violation found occurred in an uncertain area of the law; and

c. The violation was discontinued before the complaint was filed.

Thus, the Second Circuit, following the *Swanee Paper* precedent, would surely have required a different result.

The Second Circuit followed *Swanee Paper* and struck down other broad form orders not supported by the fac-

1. While today the law in this area is clear, the first decision holding the practices involved to be illegal came in July 1960 in *Clinton Watch Co.*, 57 F.T.C. 222 (1960), aff'd, 291 F. 2d 838 (7th Cir. 1961), cert. denied, 368 U. S. 952 (1962). By that time Coro had finished distributing its 1960 Catalog House insert sheets. Within a few short months, in December 1960, Coro made its decision to completely abandon Catalog House sales. Thus, since the *Clinton Watch* decision Coro has not distributed any catalog insert sheets—the activity herein complained of. This demonstrates that Coro acted decisively to obey the law *once the law became clear.*

tual pattern in the records in *Grand Union Co.* v. *FTC*, 300 F. 2d 92 (2nd Cir. 1962) and *American News Co.* v. *FTC*, 300 F. 2d 104 (2nd Cir.), cert. denied, 371 U. S. 824 (1962). Last year the Second Circuit struck down two more broad form FTC orders in the light of the particular factual contexts of the cases before it. In *Country Tweeds, Inc.* v. *FTC*, 326 F. 2d 144 (2nd Cir. 1964), that court stressed that the restrictions contained in Labor Board cases and other FTC cases apply equally well to cases involving deceptive practices. Similar factual considerations were stressed in *R. H. Macy & Co.* v. *FTC*, 326 F. 2d 445 (2nd Cir. 1964).

In all five of these Second Circuit cases the court emphasized that before upholding a broad form order the facts must be analyzed, and when these facts indicate no likelihood of any illegal practice beyond the precise practice involved, the reviewing court has the duty to narrow the scope of the FTC order. The Second Circuit emphasized such factors as the absence of other past violations, the extent of the proven violations, the circumstances of the proven violations, and whether the proven violations had been abandoned prior to the FTC's complaint. All of these factors were indeed mentioned by the First Circuit herein and in each instance that factor indicated that a broad form order was uncalled for. Yet, these factors were disregarded and the FTC given carte blanche to issue an order covering the entire range of Coro's business virtually as a matter of unreviewable discretion.

This case, therefore, is totally at variance with the five decisions constituting the law in the Second Circuit.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Decision of the Court Below

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 6267

CORO, INC., ET AL.,

Petitioners,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*

Ira M. Millstein, with whom *Marshall C. Berger, Irving Scher* and *Weil, Gotshal & Manges* was on brief, for petitioners.

Gerald Harwood, Attorney, with whom *James McI. Henderson*, General Counsel, and *J. B. Truly*, Assistant General Counsel, were on brief, for respondent.

OPINION OF THE COURT

November 10, 1964

WOODBURY, *Chief Judge*. Coro, Inc., is a New York corporation with its home office in the City of New York

and manufacturing plants in Canada, England and Providence, Rhode Island. It is and for years has been engaged in the business of manufacturing, selling and distributing costume jewelry and, until recently, watches.[1] Coro's stock has been listed on the American Stock Exchange since 1929. It does a nation-wide business and the hearing examiner described it as "a large, responsible, publicly held corporation."

Most of Coro's sales have always been to department stores, variety stores and similar retail outlets. But beginning in 1955 or 1956 it began to sell a special line of jewelry and watches exclusively to so-called "catalogue houses."[2] In connection with this line of business Coro furnished printed sheets, and in some instances photographic transparencies, for binding in the catalogue houses' catalogues describing and illustrating Coro's products and giving the price at which the product could be bought from the catalogue house plus a wholly fictitious "list" or "retail" price which was arrived at in accordance with the general prevailing practice of catalogue houses by application of the so-called "three times formula." By this formula the price at which Coro sold an item to the catalogue house was multiplied by three to arrive at a purported list or retail price for the item and that price was divided in half to arrive at the price at

[1] It conducted its watch business through a wholly owned subsidiary corporation.

[2] These establishments sell from catalogues to industrial, commercial and fraternal organizations for their use as gifts to customers or prizes or awards to employees or members, to small-town retailers for resale to customers, and, to a limited extent, to individual customers who purchase by mail-order or over the counter at "show-rooms," in effect retail stores, which catalogue houses operate in a few of the larger cities.

which the house advertized and inevitably sold the article to purchasers. Thus a purchaser looking at the catalogue would assume that he was buying from the catalogue house for one half the usual ordinary retail price charged for the item in the area, whereas in truth and in fact there was no such price or indeed any retail price for the article anywhere because it was part of a special line manufactured exclusively for and sold only by and through catalogue houses.

Coro advertized the watches it sold to catalogue houses through its wholly owned subsidiary as "guaranteed in writing for one full year," and "guaranteed imported Swiss movement" thereby representing that the watches were unconditionally guaranteed, whereas the written guarantee which went to the ultimate purchaser with the watch required payment of a service charge.

Apparently by 1960 Coro entertained misgivings as to the propriety of printing fictitious "list" or "retail" prices on the sheets it submitted to catalogue houses for insertion in their catalogues. It is not entirely clear whether these misgivings sprang from an investigation already started by representatives of the Federal Trade Commission or not. At any rate for the year 1960 Coro did not suggest any "list" or "retail" prices on the catalogue sheets it sent to catalogue houses but printed thereon only the cost of its items to the catalogue house. However, with these sheets Coro sent a letter to the catalogue houses which in pertinent part stated: "On the basis of past experience, we can advise you that catalogs using our insert usually take a mark up of 50% of their cost. Catalogs usually suggest a retail price of double this amount for their dealer." In December, 1960, definitely after investigation by the Federal Trade Commission had begun, Coro stopped

its sales to catalogue houses altogether and in April, 1961, the Federal Trade Commission issued a complaint against Coro, Inc., and also against Gerald E. Rosenberger individually, Coro's president, largest stockholder and the chairman of its board of directors, and two of Coro's principal executive officers. The complaint alleged two substantive offenses. It charged first that by supplying catalogue houses with sheets for insertion in their catalogues showing fictitious and exaggerated retail prices for its products Coro had supplied retailers with the means for misleading their customers and the public as to the usual prevailing retail prices of its products, and second that Coro had misrepresented the guarantee covering its watches in that it represented in its catalogue insert sheets that its watches were "unconditionally guaranteed," whereas in fact the guarantee called for the payment of a service charge.

After hearings at which both sides adduced evidence, the hearing examiner found the charges against Coro sustained both as to the fictitious pricing of its products and as to misrepresentation of the guarantee on its watches, but, finding no sufficient reason for holding Rosenberger and the other corporate officers individually responsible, he dismissed the complaint as to them. Coro appealed to the Commission only the hearing examiner's finding that it had fictitiously priced its products. The Commission granted the appeal and also notified counsel that on its own motion it would review the hearing examiner's dismissal of the complaint against Rosenberger. It denied Coro's exceptions to the hearing examiner's initial decision, overruled the examiner's dismissal of the complaint against Rosenberger and issued a proposed cease and desist order against both to which both filed exceptions.

The Commission disallowed their exceptions to its proposed order and entered a final order in the same terms which we shall consider hereinafter.

The petitioners do not contest the hearing examiner's findings with respect to the advertized guarantees on the watches Coro's subsidiary sold to catalogue houses. Nor do they contest the Commission's finding that Coro engaged in the unfair practice of fictitious pricing with respect to its sales of costume jewelry to catalogue houses. They summarize their contention in their brief as follows:

> "Petitioners do not contest these findings of the Commission. Coro's explanation for having engaged in these practices was and is simply that Catalog Houses had existed for years; that Coro's competitors were selling to the Catalog Houses and using the very practices here complained of; that Coro did nothing more than its competitors and hundreds of suppliers did; and, that while this competitive situation may not excuse Coro, it should be taken into consideration in determining whether to bring the instant proceeding, whether to dismiss the complaint once the proceeding was initiated, and finally what type of order to enter assuming one was necessary."

The petitioners contend that no order at all should have been entered against them because Coro had stopped doing business with catalogue houses before the complaint herein was filed and had no intention of resuming that line of business in the future. Their argument in support of this contention can conveniently be divided into two phases.

One phase of their argument is that the Commission "was arbitrary, unreasonable, capricious and discriminatory" in refusing to permit them to sign a stipulation to

cease and desist pursuant to sub-part E of the Commission's former Rules of Practice, Procedure and Organization quoted in pertinent part in the margin.[3]

To avail themselves of the Commission's policy favoring voluntary agreements to cease and desist the petitioners did not undertake to negotiate a consent order before trial, as they were advised that they might do in the notice appended to the Commission's complaint, wherein it is stated: "If any respondent elects to negotiate a consent order, it shall be done in accordance with Section 3.25 of the Commission's rules of Practice." Instead they elected to defend the complaint and then undertook to stipulate settlement during trial. And to establish their claim of arbitrary, capricious and discriminatory action on the part of the Commission in refusing to let them do so, they filed in the course of the proceedings before the hearing examiner an application for a *subpoena duces tecum* directing the Secretary of the Commission and its project attorney in charge of the case to appear before the hearing examiner and testify, and to bring with them "all relevant documents" in the Commission's files "bearing upon or concerning the investigation conducted in this matter and the initiation of the instant complaint, and bearing upon or concerning the policies and practices of the Federal Trade Commission with respect to former Sub-Part E of the General Procedures of the Federal Trade Commission, to wit, 'Stipulation to Cease and Desist.'"

[3] "Section 1.5. *Policy*. In order to avoid the expense and time involved in formal legal proceedings, it is the policy of the Commission to afford individuals, partnerships and corporations who have engaged in unlawful acts and practices an opportunity to enter into voluntary agreements to cease and desist therefrom, when it appears to the Commission that such procedure fully safeguards the public interest. . . . The Commission reserves the right in all cases to withhold the privilege of disposition by voluntary agreement."

The petitioners' assertion of error in denying their application for *subpoena duces tecum* to explore generally into the "policies and practices" of the Commission with respect to the disposition of cases before it by stipulation rests upon the proposition that under the circumstances they had a "right" to stipulate. This is not so. The most they had was a "privilege" to do so. But the petitioners say that the Commission cannot constitutionally deprive them of the privilege arbitrarily, capriciously or discriminatorily and that the only way they can establish such unconstitutional action by the Commission is by issuing the *subpoena duces tecum* for which they asked. The long and short of the petitioners' argument is that having given up their business with catalogue houses without any intention of resuming it, they should have been allowed on the basis of prior decisions of the Commission in other cases to close this case by stipulation and hence could only have been denied the privilege of stipulation by the arbitrary, capricious etc. fiat of the Commission which could only be discovered by a general exploration of the Commission's action in other cases.

The petitioners cite no authority in support of this argument and we have not found any. Nor have they pointed out any specific action by the Commission in other practically identical cases on which to base a belief that the Commission's denial of the privilege of stipulation might have been arbitrary or capricious. All they have shown is a bare suspicion which if well founded might support their assertion of error. But subpoenas are not issued on bare suspicion. They are not licenses for extended fishing expeditions in waters of unknown productivity in the vague hope of "catching the odd one." See *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 221

(1951). Moreover, there are two obvious bases for the Commission's refusal to permit stipulation. One is that the petitioners did not seek a consent order at the outset of the proceeding but attempted to stipulate disposition during trial. The other is that the petitioners ceased doing business with catalogue houses only just before the complaint was filed and after investigation by the Commission had begun. We see no error in denying the broad subpoena requested.

The other phase of the petitioners' argument rests primarily upon *National Lead Co.* v. *FTC*, 227 F.2d 825, 839 *et seq.* (C.A. 7, 1955), *reversed in other particulars*, 352 U.S. 419 (1957), wherein the court of appeals set aside as arbitrary a cease and desist order of the Commission directed against a respondent-petitioner which had abandoned without intention of resuming the lead pigment industry wherein the illegal practices had occurred.

It has long been well settled that § 5 of the Federal Trade Commission Act, from its enactment in 1914, 38 Stat. 719, to its present form, 15 U.S.C. § 45, clothes the Commission with broad discretion to determine whether a cease and desist order is needed to make certain that a method of competition or a trade practice it has found unlawful will be stopped and not resumed. The Commission, however, is not empowered to issue a cease and desist order as punishment for past offenses. It has power only to put a stop to present unlawful practices and to prevent their recurrence in the future. See *New Standard Pub. Co.* v. *FTC*, 194 F.2d 181, 183 (C.A. 4, 1952), and cases cited. On this basis the Court of Appeals for the Seventh Circuit in the *National Lead* case set aside as arbitrary a cease and desist order entered against a corporation which was no longer engaged in the lead

pigment industry in which the unlawful practice had occurred and had divested itself of its production properties. See also *Eugene Deitzgen Co.* v. *FTC*, 142 F.2d 321, 331 (C.A. 7, 1944), in which the court said: "If the practice has been surely stopped and by the act of the party offending, the object of the proceedings having been attained, no order is necessary, nor should one be entered."

The petitioners assert that the unlawful practice found by the Commission occurred only in connection with Coro's business with catalogue houses, and they say that the practice surely stopped when Coro abandoned that line of business without any intention to resume it. It is true that the specific unlawful pricing practice occurred only in Coro's business with catalogue houses. And it is also true that it gave up that line of business a few months before the Commission filed its complaint and that its officers testified that they had no intention to resume it. But Coro gave the line of business up only after the Commission had started to investigate its practices therein and only a few months before the Commission filed its complaint, and we have only the current corporate officers' expression of intention not to resume the business. Coro has not disposed of its plant. It is still in the costume jewelry business and there is nothing to suggest that it does not intend to continue in that general industry. We think the Commission did not exceed its statutory powers in issuing a cease and desist order against Coro.

The serious question involved in this appeal is the scope of the order issued by the Commission against Coro, that is whether the order should be limited to apply only to sales to catalogue houses or whether the violations in that particular line of business are a sufficient peg upon which to hang an order against fictitious pricing throughout Coro's business.

It is true that there is no showing of past violations by Coro, that the violation found was with respect to less than 1% of Coro's business, that its conduct was in accordance with the long established practice of catalogue houses and that it stopped doing business with catalogue houses before the complaint issued. But in *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608 at pages 611, 612 and 613 (1946), the Court noted that the Commission "has wide discretion in its choice of a remedy deemed adequate to cope" with unlawful practices within the scope of its jurisdiction and that judicial review "extends no further than to ascertain whether the Commission made an allowable judgment in its choice of remedy," and said: "The Commission is the expert body to determine what remedy is necessary to eliminate the unfair or deceptive practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere, except where the remedy selected has no reasonable relation to the unlawful practices found to exist." The Court in *FTC* v. *Henry Broch & Co.*, 368 U.S. 360 (1962), applied these principles to hold that a court of appeals erred in modifying a Commission cease and desist order so as to eliminate all references to "any other seller principal" and to "any other buyer," thus limiting application of a Commission's order to future sales by the same seller to the same buyer and we think by the same token we would err should we limit the Commission's order only to Coro's sales to catalogue houses. Nor do we think the Commission's order unclear or indefinite when interpreted and applied in accordance with the criteria outlined in *FTC* v. *National Lead Co.*, 352 U.S. 419 (1957).

We do think, however, that there is not a sufficient showing to warrant the inclusion of Rosenberger personally in the order. He was Coro's largest stockholder, its president

and the chairman of its board of directors. And there is testimony, his own, that he had "overall corporate responsibility" and "responsibility for the acts and practices of the corporation" and that he made the decision to put Coro into the catalogue house business. But there is no showing that he was aware of the pricing practices of catalogue houses or that he personally knew of Coro's participation in those practices. In short, unlike Theodore R. Hodgkins in *Forster Mfg. Co.* v. *FTC*, 335 F.2d 47 (C.A. 1, 1964), there is no showing of Rosenberger's active or even actual personal participation in the unlawful practices of the corporation under his overall management and control. In the absence of evidence of personal involvement in Coro's unlawful conduct, we think the hearing examiner was correct in finding no sufficient reason for holding Rosenberger individually responsible and in dismissing the complaint as to him individually.

Decree will be entered modifying the Commission's order by deleting reference therein to Gerald E. Rosenberger individually and enforcing the order as so modified.

APPENDIX B

Pertinent Provisions of the Federal Trade Commission Act

§5(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * *

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 227(a) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

PROCEEDING BY COMMISSION; MODIFYING AND SETTING ASIDE ORDERS

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corpora-

tion so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 1-6 and 7-18 of this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside,

in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

REVIEW OF ORDER; REHEARING

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are

ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

JURISDICTION OF COURT

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set side orders of the Commission shall be exclusive.

PRECEDENCE OF PROCEEDINGS; EXEMPTION FROM LIABILITY

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

SERVICE OF COMPLAINTS, ORDERS AND OTHER PROCESSES; RETURN

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

FINALITY OF ORDER

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

SAME; ORDER MODIFIED OR SET ASIDE BY SUPREME COURT

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

SAME; ORDER MODIFIED OR SET ASIDE BY COURT OF APPEALS

(i) If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

SAME; REHEARING UPON ORDER OR REMAND

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

DEFINITION OF MANDATE

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of

thirty days from the date of issuance thereof, means the final mandate.

PENALTY FOR VIOLATION OF ORDER

(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.